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No. 80-2002

In the Supreme Court of the United States

OCTOBER TERM, 1980

FRANKLIN EUGENE NIXON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government improperly failed to disclose an agreement not to prosecute a witness in exchange for his testimony.

2. Whether petitioner's false statements before a grand jury were material to the grand jury's inquiry.

3. Whether petitioner was denied his right to a speedy trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 634 F. 2d 306.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1981. A petition for rehearing was denied on April 29, 1981. The petition for a writ of certiorari was filed on May 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on six counts of making false declarations before a federal grand jury, in violation of 18 U.S.C. 1623. The district court sentenced him to concurrent terms of two

years' imprisonment on each count (Pet. App. A5). The court of appeals affirmed in a detailed opinion upon which we chiefly rely (Pet. App. A1-A16).

1. The unusual events that led to the prosecution in this case began on June 7, 1975, when a suspect was arrested in Orlando, Florida, for distributing counterfeit five dollar bills (I Tr. 13; IV Tr. 48).[1] The suspect told Secret Service agents that his source for the counterfeit currency was Jim Gunnin, an employee at a printing supply company managed by petitioner (I Tr. 13; IV Tr. 58). Gunnin was arrested on June 26, 1975 (I Tr. 23, 35), and thereafter implicated petitioner as his partner in the counterfeiting enterprise. He advised the agents that the printing press was in petitioner's home and that petitioner had informed him that he had disposed of the counterfeiting paraphernalia by dropping it into a lake near his vacation property (I Tr. 42-46, 65, 192).

The following day, petitioner was arrested on counterfeiting charges, and search warrants were executed at his residence and place of business (I Tr. 19, 51, 72). A search of petitioner's basement revealed a multilith printing press, a paper cutter, a cloth wiper containing traces of green ink, three scraps of goldenrod paper employed to make printing plates and other miscellaneous printing paraphernalia (I Tr. 20-23, 72-76). A search of his business premises revealed a quantity of paper of the type used for printing genuine currency, concealed above a room partition (I Tr. 24-26; II Tr. 19-20, 167-168).

More probative evidence implicating petitioner in the scheme was not forthcoming, however, and divers were unable to locate any counterfeiting paraphernalia on the lake bottom. Based on the available evidence, petitioner's good reputation in the community, and his apparent lack of

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[1] "Tr." refers to the five-volume transcript of the trial.

motive, the prosecutor in charge of the case determined that a counterfeiting conviction was improbable. Accordingly, he declined to seek an indictment and, in December 1975, filed a motion pursuant to Fed. R. Crim. P. 48(a) to dismiss the complaint (I H. Tr. 3-10; II H. Tr. 13-20, 46-49).[2]

In late 1977, the prosecutor obtained additional information implicating petitioner in the counterfeiting scheme (II H. Tr. 20-27). He therefore initiated a grand jury investigation, presented the testimony of several witnesses during August and October, and subpoenaed petitioner, who testified on December 6, 1977 (II H. Tr. 27, 49). In response to the prosecutor's questions, petitioner denied that he knew Gunnin was involved in counterfeiting prior to the investigation, that he possessed counterfeit currency and pieces of counterfeit bills, and that he discussed with Gunnin his meetings with investigators (II H. Tr. 34-36; II Tr. 53-61). Following this testimony, the prosecutor still did not seek an indictment.

In December 1978, a college student found a plastic bag containing the remnants of counterfeit currency and counterfeiting paraphernalia in a lake bed adjacent to petitioner's vacation property. Examination of the materials revealed the fingerprints of both petitioner and Gunnin (I H. Tr. 52-54; I Tr. 102-116; II Tr. 197). On the basis of this new evidence, a new prosecutor who had assumed responsibility for the case obtained an indictment against petitioner in April 1979 charging him with making false statements before the grand jury in December 1977 (II H. Tr. 65-66).

2. At trial, the government introduced the transcript of petitioner's grand jury testimony (Gov't Exh. 172; II Tr. 56-59), as well as the items seized during the searches, the

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[2]"I H. Tr." refers to the transcript of the hearing held on May 31, 1979; "II H. Tr." refers to the transcript of the hearing held on June 8, 1979.

counterfeit currency and paraphernalia discovered in the lake bed, and evidence showing that petitioner's fingerprints appeared on a cleanup blotter (I Tr. 20-28, 125-130, 155-159; II Tr. 197, 213-225). Gunnin testified that, during the fall of 1974, he and petitioner discussed the possibility of using their knowledge of printing techniques to manufacture counterfeit currency. To effectuate the scheme, petitioner obtained a multilith printing press, which he installed in the basement of his home (I Tr. 169, 180-181). After the press was acquired, petitioner and Gunnin made negatives by photographing genuine bills at petitioner's business during non-working hours. The negatives were converted into printing plates at the plant and at petitioner's home (I Tr. 169-176, 252). On May 22 and May 23, 1975, petitioner and Gunnin printed a large quantity of five and ten dollar bills in petitioner's basement. After separating a number of sheets into individual bills, petitioner gave Gunnin approximately $1,500 of the counterfeit currency for distribution (I Tr. 180-185, 252-255). The parties destroyed or disposed of counterfeit bills that were incomplete or flawed (I Tr. 185-186; II Tr. 4, 12). Gunnin also testified that after the counterfeit bills had been discovered, petitioner had informed him that he had been visited by agents and stated that, although Gunnin was a suspect, the agents had little actual basis for their suspicions (I Tr. 194-195).

In addition, the evidence showed that petitioner attempted to induce a scrap dealer to pass his counterfeit currency, that petitioner purchased inks of the type employed in the manufacture of the counterfeit currency, that the paper used in manufacturing the counterfeit bills was of the same consistency as the paper seized in petitioner's plant, and that the ink on the counterfeit bills matched the ink on the cloth wiper found in petitioner's basement (II Tr. 129-133, 141-144, 168, 175-178). Finally, a Secret Service counterfeiting expert testified that exact photographic representations of the scraps of goldenrod paper found at petitioner's

home (Gov't Exh. 169) corresponded in size and configuration to the seal and serial numbers on the negative of a counterfeit bill; thus, the scraps were apparently cutouts from a sheet of goldenrod paper prepared to mask the negative in adding the seal and serial number to a printing plate (II Tr. 29-32, 43-44).

3. On appeal, the court of appeals first held that petitioner was not denied his constitutional right to a speedy trial. Petitioner initially was arrested for counterfeiting, and he was later indicted for making false declarations before the grand jury. Although the false declarations related to his counterfeiting activities, the court held that the delay in bringing petitioner to trial should not be calculated from the date of the counterfeiting indictment, but from the date of the perjury indictment, since the charges were quite different in character (Pet. App. A5-A9). The court next held that the grand jury was investigating a matter of legitimate investigative concern, and that petitioner's testimony was therefore material to the grand jury's inquiry, even if an indictment for counterfeiting would have been subject to dismissal on speedy trial grounds (Pet. App. A9-A11).[3] Finally, the court unanimously held that, although the government had in effect promised immunity to witness Gunnin in exchange for his testimony and had not revealed that promise to the defense, the fact of the promise had come out at trial, and the non-disclosure could not have prejudiced petitioner (Pet. App. A11-A16).

ARGUMENT

1. Petitioner first contends (Pet. 8-11) that the prosecutor's failure to disclose its non-prosecution agreement with witness Gunnin requires reversal. As the court of appeals pointed out (Pet. App. A13), there was no express promise

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[3]Judge Coleman dissented on the issues of speedy trial and materiality (Pet. App. A17-A19).

not to prosecute Gunnin. Rather, the prosecutor in his discussions with Gunnin's attorney in 1979 stated that he did not intend to prosecute Gunnin for counterfeiting because he believed that any new indictment would be subject to dismissal on speedy trial grounds (*ibid.*).[4] Under these unusual circumstances, the court of appeals held that the prosecutor's representation in effect constituted a non-prosecution agreement in exchange for Gunnin's testimony, and that the agreement therefore should have been disclosed to the defense (*id.* at A14). Nevertheless, because all the facts surrounding this agreement had come out at trial, the court correctly held that it was not necessary to reverse petitioner's conviction and order a new trial.[5]

The absence of prejudice clearly defeats petitioner's claim. The obligation to disclose exculpatory evidence is "not a discovery rule, but a rule of fairness and minimum prosecutorial obligation." *United States* v. *Beasley*, 576 F. 2d 626, 630 (5th Cir. 1978). Thus, when exculpatory evidence is revealed at trial and there is no showing that its late disclosure prejudiced the defendant, there is no basis for reversal. See *United States* v. *Campagnuolo*, 592 F. 2d 852, 860-861 & n.6 (5th Cir. 1979); *United States* v. *Weidman*, 572 F. 2d 1199, 1205 (7th Cir.), cert. denied, 439 U.S.

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[4]The meeting with Gunnin's counsel occurred after the prosecutor sought to have Gunnin plead guilty to a new indictment and after Gunnin threatened to refuse to cooperate if he were in fact indicted (Pet. App. A12-A14).

[5]In order to ensure that the facts relating to the non-prosecution agreement had been fully revealed at trial, the court of appeals ordered a remand to the district court for a hearing on the matter. The remand hearing revealed that there was nothing material regarding the non-prosecution agreement that was not laid before the jury when Gunnin was cross-examined at trial (Pet. App. A15).

821 (1978); cf. *United States* v. *Morrison*, No. 79-395 (Jan. 13, 1981).[6]

2. Petitioner next argues (Pet. 11-13) that his testimony before the grand jury was not material because it was taken solely for the purpose of bringing a prejury prosecution against him. As the court of appeals properly held, however, the counterfeiting operation was clearly a matter within the grand jury's competence to investigate, and petitioner's testimony about his involvement in the operation was clearly material to the grand jury's investigation (Pet. App. A9-A10).

Petitioner's argument fails for several reasons, starting with its premises. First, it is by no means clear that an indictment for counterfeiting in December 1977, when petitioner was called to testify before the grand jury, would have been dismissible on speedy trial grounds. Petitioner had never been indicted before on the counterfeiting charges; rather, he had been arrested on a complaint, and the complaint had later been dismissed without formal charges being lodged against petitioner. Since there were no charges pending against petitioner following the dismissal in December 1975, the period between 1975 and his grand jury appearance in December 1977 should not be counted in determining whether his speedy trial rights were violated. See *United States* v. *Martin*, 543 F. 2d 577, 579 (6th Cir.),

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[6]Petitioner's reliance on three Second Circuit cases (Pet. 9-10) is misplaced. Those cases stand for the proposition that when the prosecutor acts in bad faith in refusing to disclose exculpatory information, the showing of materiality required for reversal should be reduced. Even assuming that these cases have survived *United States* v. *Agurs*, 427 U.S. 97, 110 (1976), they do not stand for the proposition that reversal is required when exculpatory information is not disclosed until trial. Likewise, the decision in *Woodcock* v. *Amaral*, 511 F. 2d 985 (1st Cir. 1974), does not purport to relieve the defendant of the obligation of demonstrating prejudice from an asserted violation of the prosecutor's duty to disclose.

cert. denied, 429 U.S. 1050 (1977); *United States* v. *Flores*, 501 F. 2d 1356, 1359-1360 (2d Cir. 1974); *United States* v. *Bishton*, 463 F. 2d 887, 891 (D.C. Cir. 1972).[7]

Second, even if the period between December 1975 and petitioner's grand jury testimony were counted for speedy trial purposes, it is not clear that an indictment for counterfeiting at that time would have been dismissible on speedy trial grounds. The delay of two years would not have been an extraordinarily long one; the absence of sufficient evidence to convict was certainly a justifiable reason for dismissing the first complaint; the absence of charges against petitioner during the intervening period freed him from the stigma of an outstanding criminal prosecution; and there is no indication of any way that the delay could have prejudiced petitioner. Thus, under the standards in *Barker* v. *Wingo*, 407 U.S. 514 (1972), an indictment in December 1977 might well have survived a speedy trial challenge. For that reason, the grand jury was properly continuing to investigate the counterfeiting operation.

Finally, even if an indictment against petitioner could not have survived a motion to dismiss, the grand jury nonetheless was properly performing its duty when it called petitioner before it. The grand jury had substantial evidence regarding a counterfeiting operation in its district within the applicable statute of limitations. Even if petitioner could have escaped conviction, it was proper for the grand jury to complete the investigation of the matter to satisfy itself that persons other than petitioner were not also involved in the

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[7]This issue is pending before this Court in *United States* v. *MacDonald*, cert. granted, No. 80-1582 (May 26, 1981). We do not believe that it is necessary to hold this case for *MacDonald*, however, since even under the rule adopted by the Fourth Circuit in that case, petitioner's claim would fail, for the other reasons given here and by the court of appeals.

counterfeiting operation.[8] By choosing to lie rather than to claim his Fifth Amendment privilege against compulsory self-incrimination, petitioner exposed himself to a prosecution for perjury.

3. Petitioner contends (Pet. 13-15) that he was denied a speedy trial by the sequence of charges in this case. As the court of appeals correctly held (Pet. App. A5-A9), petitioner's claim fails principally because the charge on which he was convicted was based on conduct different from the conduct for which he was initially arrested.[9] In fact, the false testimony for which he was convicted did not even occur until two-and-one-half years after his arrest for counterfeiting.

Clearly, the right to a speedy trial as to one criminal charge does not attach as of the date of an earlier, but different, criminal charge. See *Gravitt* v. *United States*, 523 F. 2d 1211, 1215 n.6 (5th Cir. 1975); *United States* v. *DeTienne*, 468 F. 2d 151 (7th Cir. 1972), cert. denied, 410 U.S. 911 (1973). Only if the charges are for the same or essentially the same conduct has any court held that the Speedy Trial Clause requires that the elapsed time be calculated from the date of the first charge. See *United States* v. *Avalos*, 541 F. 2d 1100 (5th Cir. 1976), cert. denied, 430

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[8]For this reason, the decision of the Eighth Circuit in *Brown* v. *United States*, 245 F. 2d 549 (1957), is of no assistance to petitioner. In that case, a grand jury in Nebraska brought the defendant before it to answer questions relating to an investigation having nothing to do with Nebraska. The defendant was questioned, the court concluded, solely in order to make a perjury case against him. Because there was ample basis for the grand jury's investigation in this case, *Brown* is inapposite.

[9]As noted earlier, it is our view that even if the second charge were identical to the first, the speedy trial claim would fail because the period after dismissal of the first charge and before the second charge was brought is not included in the speedy trial calculations. See Brief for the United States in *United States* v. *MacDonald*, No. 80-1582.

U.S. 970 (1977). In this case, it would have been impossible to charge petitioner with false declarations in June 1975, since he did not appear before the grand jury until December 1977. The two sets of charges were therefore different not only in nature, but also in the time at which they were committed. See *United States* v. *Reed*, 647 F. 2d 849, 852-853 (8th Cir. 1981). The time for calculating petitioner's speedy trial rights therefore could not begin to run until he was indicted in April 1979 for making false declarations before the grand jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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